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Supreme Court, U.S.
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No. 94-1946

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SECRETARY OF PUBLIC WELFARE
OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

IDELL S.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court of Appeals correctly concluded that Petitioner violated the Americans with Disabilities Act by providing attendant care services to a qualified individual with a disability only in a segregated nursing facility when Petitioner stipulated that it was appropriate and less expensive to provide Respondent with the same attendant care services through its existing community-based program?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-1946

Secretary of Public Welfare
of the Commonwealth of Pennsylvania,

Petitioner,

v.

Idell S.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

A. Facts

Respondent Idell S., a forty-three year old woman with two children, is paralyzed from the waist

down as a result of meningitis. Pet. App. at A-5.[1] Due to her physical disability, Idell S. must use a wheelchair and she requires "attendant care services" to assist her with certain activities of daily living, including transferring to and from her bed and wheelchair, bathing, dressing, and toileting. J.A. at 245-246. Id.

The Department of Public Welfare ("DPW"), administered by Petitioner, provides attendant care services to people with physical disabilities in two settings -- nursing facilities and the community. Pet. App. at A-5; J.A. at 245. Idell S. was forced to enter a nursing facility paid for by Petitioner in December 1989 and to stay there only because she was unable to obtain services she needs to assist her with her daily living activities in the community. See id. As the Court of Appeals noted, "[t]he parties agree that, although Idell S. is not capable of fully independent

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[1]References to "Pet. Br." and "Pet. App." are to the Brief and Appendix to the Petition for A Writ of Certiorari, respectively. References to "J.A." are to the Joint Appendix filed in the Court of Appeals and, in particular, to the facts to which the parties stipulated. J.A. at 243-47.

living, she is not so incapacitated that she needs the custodial care of a nursing home." Pet. App. at A-5. In the nursing facility, Idell S. was unable to live with and raise her children and to live with people without disabilities. See Pet. App. at A-6; J.A. at 245.

In September 1993, DPW rejected Idell S.'s application to receive attendant care services in her own home through DPW's existing community attendant care program, rather than in the nursing facility, even though DPW stipulated that "[t]he setting for the provision of attendant care services appropriate to the needs of Idell S. is in the community" and that "[w]ith attendant care services in the community, nursing home care would not be appropriate for Idell S." J.A. at 244, 245. See also Pet. App. at A-6. DPW's refusal to provide Idell S. with attendant care services in her own home was particularly puzzling in light of the stipulated facts that DPW already operated a program to provide in-home attendant care services and that the average cost to DPW of the community attendant care program is $9,300 less than the average cost to the state of nursing facility care. J.A. at 245, 246.

B. Procedural History

Idell S. filed this lawsuit to challenge DPW's continued provision of attendant care services to her in a nursing facility, rather than in the community. Idell S. contended that DPW's failure to provide her with attendant care services in the community violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and, in particular, a regulation, 28 C.F.R. § 35.130(d), promulgated by the Department of Justice ("DOJ") pursuant to 42 U.S.C. § 12134(b). The parties stipulated to the relevant facts and filed cross-motions for summary judgment. The District Court granted summary judgment in favor of Petitioner, and Idell S. appealed.

Following full briefing by the parties, the Court of Appeals invited the United States to participate as an amicus. In its amicus brief and at oral argument, the United States informed the court that DPW violated the ADA regulation, when the parties stipulated that it was appropriate and less expensive to provide Idell S. with attendant care services in her own home rather than in the nursing facility, because the failure to provide such in-home services resulted in Idell S.'s unnecessary

segregation. Such unnecessary segregation, as well as disparate treatment between people with disabilities and those without disabilities, violates the ADA. See Pet. App. at A-17 (citing Brief of Amicus at 7).

Following the explicitly-stated statutory purposes in the ADA and giving substantial deference to DOJ's interpretation of its own regulation, the unanimous Court of Appeals held that the ADA prohibited DPW from providing attendant care services to Idell S. in an unnecessarily segregated setting under the circumstances of this case. The factual stipulations led the Court of Appeals to conclude that DPW violated the ADA by providing attendant care services to Idell S. in the nursing facility, rather than in her home, when DPW had agreed that the nursing facility was not appropriate. Furthermore, the court concluded that DPW's violation was not excusable because, as DPW stipulated, it would be less costly to care for her in the already-established program in the community, and therefore requiring DPW to provide attendant care services to Idell S. in her own home would not result in an undue burden or fundamental alteration of its programs.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE THIRD CIRCUIT'S DECISION IS CORRECT AND DOES NOT RAISE AN IMPORTANT ISSUE WARRANTING CERTIORARI.

A. The Court Of Appeals Simply Applied The Congressionally-Mandated Regulation To The Stipulated Facts.

The Court of Appeals found the regulation at issue was promulgated at the express direction of Congress in the ADA, 42 U.S.C. § 12134(b). The regulation at issue plainly requires that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). This case involved the application of the regulation to the stipulated facts. DPW provided Idell S. with a service known as "attendant care" in a nursing facility. DPW stipulated that "[t]he setting for the provision of attendant care services appropriate to the needs of Idell S. is in the community" and not the nursing facility. J.A. at 245. Thus, the Third Circuit simply applied the plain language of the regulation to

the stipulated facts when it concluded that DPW's provision of attendant care services to Idell S. in the nursing facility, rather than the more integrated setting of her own home and community, violated the ADA.

Petitioner, however, ignores the plain language of the regulation and incorrectly contends that it applies only to "services, programs, and activities" that the public entity makes available to all people (i.e., both people with and without disabilities) and excludes those "services, programs, and activities" that are provided only to people with disabilities (such as attendant care services). Petitioner's argument is premised on the erroneous assumption that Title II of the ADA prohibits only disparate treatment of individuals with disabilities in relation to non-disabled persons. Pet. at 7-8. The Court of Appeals rejected Petitioner's argument and held that the unnecessary segregation of Idell S. was in itself a violation under the ADA.

In accordance with the law established by this Court, the Court of Appeals could not accept Petitioner's argument since doing so would have required it to reject the plain language of 28 C.F.R. § 35.130(d), a regulation that DOJ promulgated at the

express direction of Congress in 42 U.S.C. § 12134(b). See Pet. App. at A-11-A-12. Moreover, the Court of Appeals had the benefit of DOJ's own interpretation of Section 35.130(d). "It is well-established that 'an agency's construction of its own regulation is entitled to substantial deference.'" Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150 (1991) (citation omitted). In other words, as long as the promulgating agency's interpretation "'sensibly conforms to the purpose and wording of the regulation,'" the courts must adhere to it because the courts "presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking power." Id. at 151. Given the deference that must be afforded to DOJ's interpretation of a regulation promulgated pursuant to congressional authority, the Court of Appeals properly adopted DOJ's interpretation of 28 C.F.R. § 35.130(d). For the same reason, certiorari is inappropriate.[2]

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[2]While a court need not grant deference to an agency's "convenient litigating position," Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988), DOJ's interpretation of the statutorily-mandated

The recognition by the Court of Appeals and DOJ that Section 35.130(d) required DPW in this case to provide services to Idell S. in her own home, rather than in the nursing facility, even though such services are available only to people with disabilities, is fully consistent with the ADA. Surveying the ADA's statutory language and legislative history, the Court of Appeals explained that segregation of people with disabilities was a key problem that Congress sought to address and that integration was the remedy that Congress chose to end segregation.[3]

The court recognized that Congress knew that "discrimination" against people with disabilities can take various forms, writing: "In enacting the ADA, Congress found that '[h]istorically, society has tended to isolate and segregate individuals with disabilities, and ... such

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regulation does not constitute a "litigating position," convenient or otherwise. DOJ was never a party to this lawsuit and, indeed, did not even agree to participate as an amicus until requested to do so by the Court of Appeals.

[3]Indeed, even Petitioner is forced to concede that "[t]he ADA has integration as a major objective ...." Pet. Br. at 13 (emphasis added).

forms of discrimination ... continue to be a serious and pervasive social problem.' 42 U.S.C. § 12101(a)(2) (emphasis added). Congress also concluded that '[i]ndividuals with disabilities continually encounter various forms of discrimination, including ... segregation ....' 42 U.S.C. § 12101(a)(5) (emphasis added)." Pet. App. at A-12 (emphases in original). The Court of Appeals further observed that "[t]he House Report on the ADA noted that: 'Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Therefore the purpose of [42 U.S.C. § 12134] is to direct ... Attorney General [Richard Thornburgh] to issue regulations setting forth the forms of discrimination prohibited.' H.R. Rep. No. 485 (III), 101st Cong., 2d Sess., 52 (1990) (emphasis added)." Id. at A-12-A-13 (emphases in original).

As the Court of Appeals concluded, Congress's recognition that disability-based discrimination is multi-faceted and that segregation is one form of such discrimination led Congress to use the ADA to maximize integration of people with disabilities.

> In furtherance of the objective of eliminating discrimination against the

> disabled, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]" 42 U.S.C. § 12101(a)(8) (emphasis added). Similarly in response to its mandate, the Department of Justice stated "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act." 28 C.F.R. Part 35, App. A, § 35.130. Accordingly, the integration mandate of § 35.130(d) is contained under 28 C.F.R. § 35.130 which is entitled "[g]eneral prohibitions against discrimination."

Pet. App. at A-13 (emphases in original; footnote omitted).

The court's analysis demonstrates that Congress intended the ADA not only to remedy disparate treatment of individuals with disabilities vis-a-vis individuals without disabilities, but also to ensure that individuals with disabilities be integrated (to the extent possible and appropriate) in the community where they can participate in and contribute to society. Accordingly, in finding that the Petitioner violated the ADA, the Court of Appeals correctly applied the statute

and its regulation to the stipulated facts that "the setting for the provision of attendant care services appropriate to the needs of Idell S. is the community," that "with attendant care services in the community, nursing home care would not be appropriate for Idell S." and that Petitioner had an existing, less-expensive, attendant care program in the community.

B. The Third Circuit Correctly Declined To Follow Decisions Under The Rehabilitation Act.

Petitioner asserts that the Third Circuit erred in declining to follow decisions in which courts had rejected claims under the Rehabilitation Act similar to that asserted by Idell S. under the ADA because Congress implicitly adopted those decisions in the ADA. Pet. Br. at 8-13. Petitioner's argument rests on an incorrect premise that the Rehabilitation Act is monolithic and that any judicial decision issued pursuant to that statute's regulations is applicable automatically to cases under Title II of the ADA. In fact, there are a multitude of varying regulations under the Rehabilitation Act (each federal agency promulgated its own regulations) and 28 C.F.R. § 35.130(d), the ADA

regulation adopted by DOJ pursuant to express congressional direction, differs significantly from 45 C.F.R. § 84.4(b)(2), the Rehabilitation Act regulation at issue in Plummer v. Branstad, 731 F.2d 574, 579 (8th Cir. 1984), and Clark v. Cohen, 613 F. Supp. 684, 691 (E.D. Pa. 1985), aff'd, 794 F.2d 79, 84-85 n.3 (3d Cir.), cert. denied, 479 U.S. 962 (1986), on which Petitioner relies.

Unlike the detailed statutory provisions in Titles I and III of the ADA, Title II of the ADA contains a general prohibition on disability-based discrimination by public entities, 42 U.S.C. § 12132, and required DOJ to promulgate regulations to implement that prohibition. 42 U.S.C. § 12134(a).[4] While Congress could have

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[4]Given Congress's delegation of authority to DOJ to promulgate regulations to implement the ADA, 42 U.S.C. § 12134(a), it is difficult to fathom Petitioner's assertion that the appellate court's interpretation of the ADA and its implementing regulations is inconsistent with the "plain statement" rule. The combination of the ADA's statutory requirement that DOJ incorporate the Rehabilitation Act's coordination regulations, see discussion infra, together with the other provisions of the ADA that define segregation as a form of prohibited discrimination make the application of Section 35.130(d) to the facts of this case consistent with the 'plain statement' rule. As for the regulation itself, Section

simply required DOJ to adhere to regulations under "the" Rehabilitation Act, it was aware that every federal department and agency had promulgated different regulations under the Rehabilitation Act and that those regulations were not identical. Congress specifically instructed DOJ to promulgate regulations under Title II that were consistent with the "coordination regulations" at 28 C.F.R. Part 41 (other than program accessibility for existing facilities and communications). 42 U.S.C. § 12134(b). Congress's choice of the "coordination regulations" as the model for the Title II ADA regulations represents a deliberate policy decision based on its recognition of significant differences between the varying sets of Rehabilitation Act regulations.

35.130(d) is quite explicit. Indeed, it is Petitioner who seeks to imply words of limitation into the regulation that do not exist. Petitioner's citation to Pennhurst v. State School & Hospital v. Halderman, 451 U.S. 1 (1981), and Gregory v. Ashcroft, 501 U.S. 452 (1991), is thus inapposite. While Pennhurst and Gregory involved amorphous, statutory provisions, the plain, unambiguous language of 28 C.F.R. § 35.130(d) -- along with its definitive interpretation by DOJ -- eliminates any dispute that it is obligatory and that its scope extends to all services provided by public entities.

The ADA regulation at issue here, 28 C.F.R. § 35.130(d), is drawn virtually verbatim from 28 C.F.R. § 41.51(d), one of the "coordination regulations" that DOJ was bound to follow pursuant to 42 U.S.C. § 12134(b). Significantly, the language of 28 C.F.R. § 41.51(d) and 28 C.F.R. § 35.130(d) differs markedly from the language of the Rehabilitation Act regulation adopted by the Department of Health and Human Services ("HHS"), 45 C.F.R. § 84.4(b)(2). HHS's regulation, at issue in Clark and Plummer, explicitly applied only to those services available to all persons -- those with and without disabilities -- and did not apply to services provided only to people with disabilities.

Accordingly, Petitioner's observation that Congress is presumed to be aware of interpretations of prior law when enacting law on the same subject, Pet. Br. at 12-13 (citing, inter alia, Lorillard v. Pons, 434 U.S. 575, 580-81 (1978)), is correct, but her conclusion is erroneous. Congress's explicit statutory mandate that DOJ follow the "coordination regulations" means that Congress did not want to adopt in the ADA those decisions, including Clark and Plummer, issued pursuant to Rehabilitation Act regulations other than the

coordination regulations. Since no court ever ruled on the scope and application of 28 C.F.R. § 41.51(d) (the coordination regulation), there are no Rehabilitation Act cases pertinent to the scope and application of its ADA analog, 28 C.F.R. § 35.130(d).[5]

C. Petitioner Misrepresents The Ramifications Of The Third Circuit's Decision.

The Petition in this case is based essentially on doomsday predictions of deinstitutionalization, fiscal and administrative chaos and sundry other far-reaching consequences. A careful reading of the Court of Appeals' decision, however, reveals no basis for Petitioner's concerns. To the contrary, the decision is quite narrow and limited to facts to which DPW stipulated.

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[5]Petitioner incorrectly implies that decisions such as Clark and Plummer under the Rehabilitation Act sub silentio rejected any claim that 28 C.F.R. § 41.51(d) required the provision of services available only to people with disabilities in the most integrated setting. The courts' silence as to the application of 28 C.F.R. § 41.51(d) cannot be imbued with any meaning since that provision applied only to federal agencies -- not to the state recipients of federal funding who were the defendants in those cases. 28 C.F.R. § 41.2.

As the Court of Appeals correctly concluded, Pet. App. at A-20, this case does not require and will not result in deinstitutionalization or the creation of an entitlement to community services for several reasons.

- The decision applies to a single individual who DPW agreed could be served most appropriately and less expensively in her own home through DPW's existing community-based attendant care program rather than in the nursing facility. The outcome turned on the facts to which DPW stipulated.
- Neither the ADA nor its regulations require a public entity to provide community services to individuals in institutions if they are not appropriate for those services based on an individualized, fact-specific inquiry. The personalized decision-making required by the ADA negates the possibility that someone might utilize this statute to support a class-based remedy to close an institution in one fell stroke.

- Neither the ADA nor its regulations require a public entity to provide any services whatsoever (and thus creates no entitlement to services). Rather, it simply requires that if the public entity chooses to provide services, it must do so in the most integrated setting appropriate to the individual's needs as long as doing so would not create an undue burden or fundamental program alteration.
- Neither the ADA nor its regulations require a public entity to provide services in non-institutional settings to individuals who are institutionalized if doing so would result in an undue burden or a fundamental program alteration. The availability of this defense negates Petitioner's argument that the court's decision can be used to achieve massive deinstitutionalization.[6]

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[6]Petitioner incorrectly cites Wyatt v. Hanan, Civil Action No. 3195-N (M.D. Ala. Mar. 6, 1995) (Pet. App. at A-42-A-43), for the proposition that the Court

Petitioner's assertion that it would impose an undue burden on DPW to provide attendant care services to Idell S. in her own home rather than in a nursing facility substitutes conjecture for the stipulated facts in the case. DPW cannot seriously assert that the decision will impose an undue fiscal burden since, as Petitioner admitted, it will cost DPW less to provide services to Idell S. in the community than in the nursing facility. See Pet. App. at A-23; J.A. at 245. As for any administrative burden, DPW's post-hoc argument that the Court of Appeals ignored the "administrative and adjudicative burden of assessing 'appropriateness'", Pet. Br. at 16, 20-21, is belied by DPW's stipulation that Idell S. was appropriate for the community, Pet. App. at A-6 & n.6; J.A. at 245, 246,

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of Appeals decision will have a broad impact and will result in "deinstitutionalization" or create any "entitlement". Wyatt recognized that the Court of Appeals' decision in this case did not require "unqualified and indiscriminate deinstitutionalization and community placements." It therefore refused to grant plaintiffs' motion for summary judgment because there remained material facts in dispute. Wyatt demonstrates that courts are not likely to construe the decision in this case to mandate deinstitutionalization or community services.

and by the fact that federal law already requires DPW to make determinations of the propriety of nursing facility treatment. See 42 C.F.R. § 456.609(b)-(c) (requiring states to inspect nursing facilities to determine whether certain residents need to remain in such facilities or whether their needs can be met through alternative institutional or non-institutional services). Such assessments neither have overwhelmed DPW nor have flooded the judiciary with claims.

Petitioner also misstates the facts when she contends that the provision of services to Idell S. in the community will result in a fundamental alteration of DPW's program. As the Court of Appeals emphasized, DPW already had a program in existence to provide in-home attendant care services, Pet. App. at A-23, and thus it would not have to create a new program. The decision also did not require Petitioner to violate state law by taking money allocated for nursing facility services and using it to fund attendant care services; indeed, Petitioner presumably did not violate state law when she ultimately provided Idell S. with attendant care services in her own home. Pet. Br. at 5.

Additionally, the fact that Petitioner has provided Idell S. with attendant care services in her home since December 1994 belies Petitioner's argument that the provision of these services would cause either an undue burden or a fundamental alteration of its existing programs. To the contrary, it demonstrates that DPW's earlier refusal to provide her with services in her home, when such services are less expensive than in the nursing facility, was quixotic.

Finally, this case does not prohibit, as Petitioner suggests, the use of waiting lists nor require a public entity to provide "immediate" community services. Waiting lists do not violate the ADA and the Court of Appeals did not rule otherwise. Respondent has never argued that people with disabilities who live in the community have a right to any services and, therefore, if a public entity chooses to limit community services, then those individuals must remain on a waiting list. Here, however, DPW knew that Idell S. was unnecessarily segregated for years in a nursing facility and did nothing to assure that she received attendant care services in her own home rather than the nursing facility even though it would cost the state less to

provide her with in-home rather than institutional services. Moreover, neither the decision of the Court of Appeals nor the ADA require public entities to establish programs -- with or without waiting lists -- if doing so would constitute an undue burden or a fundamental alteration of any of DPW's programs.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER FEDERAL COURT OF APPEALS OR ANY STATE COURT OF LAST RESORT.

No other federal court of appeals or any state court of last resort has ever interpreted or applied the specific ADA regulation, 28 C.F.R. § 35.130(d), to circumstances similar to the facts in this case.[7] Petitioner's contention that the decision in this case conflicts with the decision in Williams v. Sec'y of the Executive Office of Human Services, 414 Mass. 551, 609 N.E.2d 447 (1993), is incorrect because it did not

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[7]In fact, since the enactment of the ADA, there have been only seven published federal appellate court decisions and only five decisions of state courts of last resort regarding any provision of Title II of the ADA or any of its regulations.

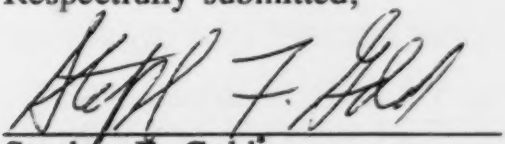
apply to a person who was unnecessarily segregated in an institution. Pet. Br. at 6-7.

Unlike Idell S., plaintiffs in Williams were individuals with mental disabilities who lived in the community with non-disabled persons -- they were not receiving services in a segregated setting -- and they alleged that the state violated 28 C.F.R. § 35.130(d) by failing to provide them with "a sufficient amount of integrated supported housing". 609 N.E.2d at 451-52. The Williams Court correctly concluded that plaintiffs were not entitled to services since they "did not show that any particular client's placement was inappropriate, or that they themselves were inappropriately placed in a segregated setting after the ADA's effective date." Id. at 453 (emphasis added). The Williams Court did not hold that 28 C.F.R. § 35.130(d) would be inapplicable in a case, such as that presented by Idell S., in which the plaintiff alleges that she was inappropriately placed in a segregated setting. Thus, Williams does not conflict with the decision in this case.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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